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By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund (the “Fund”) and we write in response to your letter of May 18, 2016 (the “Letter”) requesting the production of documents in connection with oversight being conducted by the House Committee on Science, Space, and Technology (the “Committee”). We have considered your letter and for the reasons discussed below, we respectfully decline the Committee’s request.

Background

The Fund is a private foundation created in 1940 by the sons of John D. Rockefeller Jr.—John D. 3rd, Nelson, Winthrop, Laurance, and David—as a vehicle to share advice and research on charitable activities and to coordinate their philanthropic efforts. Today, through a variety of grant-making programs, the Rockefeller Brothers Fund seeks to advance social change that will contribute to a more just, sustainable and peaceful world.

One of the Fund’s programs is the Sustainable Development Program, which is primarily concerned with climate change. The Fund conducts its charitable activities in a transparent manner and the Sustainable Development Program’s guidelines and grant spending are publicly disclosed on the Fund’s website.¹ Any person wishing to learn about the full range of the Fund’s grant-making activities relating to the Sustainable Development Program may do so by using the search engine provided on this website.²

¹ See, e.g., “Sustainable Development,” at <http://www.rbf.org/programs/sustainable-development>; see also “Sustainable Development Guidelines,” at <http://www.rbf.org/programs/sustainable-development/guidelines>.

² See “Grants Search,” <http://www.rbf.org/grants-search> (permitting the public to search for grants made by the Rockefeller Brothers Fund from 2003 to the present).

The Committee's Letter

The Letter asks the Fund to provide two categories of documents to the Committee. First, the Letter seeks communications between the Fund's personnel and the offices of State attorneys general relating to investigations and lawsuits concerning the issue of climate change. Second, the Letter seeks communications between the Fund's personnel and several private organizations relating to investigations and lawsuits concerning the issue of climate change. The Letter locates the Committee's authority to seek these documents in House Rule X.

The Rockefeller Brothers Fund's Response To The Committee

For the following reasons, we cannot comply with the Letter's request.

First, the Letter seeks documents that are protected by a qualified privilege that emanates from rights guaranteed by the First Amendment: freedom of speech and freedom of association. Speech on public issues is entitled to "special protection" under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The Supreme Court also has recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition, for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010). For these reasons, any state action that may curtail the freedom to associate is subject to the closest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

This First Amendment privacy interest is "not easily overridden"; the party seeking the information must assert a "compelling interest" in obtaining the information. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). Congress is subject to the limitations of the First Amendment whether it is acting in its legislative or investigative capacity. *See Watkins v. United States*, 354 U.S. 178, 197 (1957).

Second, the Rockefeller Brothers Fund has a fundamental right to keep private the particular communications sought by the Committee members. The Letter seeks internal documents and communications relating to the support for litigation provided by foundations and public charities. Support of litigation is a form of expression and association that is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). Courts have declined to compel litigants to identify even the names of those who support their lawsuits, let alone the broader type of information sought by the Letter. *See AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (holding that the "compel[led] public disclosure of an association's confidential internal materials . . . intrudes on the privacy of association and belief guaranteed by the First Amendment"); *Beinin v. Center for the Study of Popular Culture*, 2007 U.S. Dist. LEXIS 47546

(N.D. Cal. Jun. 20, 2007) (“First Amendment interests are implicated . . . when the identity of those who have privately offered verbal support for litigation is sought in discovery.”); *see also Eilers v. Palmer*, 575 F. Supp. 1259, 1261 (D. Minn. 1984) (holding that compelled disclosure of the identities of those supporting litigation might burden the First Amendment rights of both the litigants and their supporters). The compelled disclosure of the materials requested by the Committee would burden the Fund’s “significant First Amendment interest in associational autonomy” because it would interfere with the Fund’s “internal operations and with their effectiveness” and would likely “chill future individual political activity” by some of the parties involved in the communications. *AFL-CIO*, 333 F.3d at 176-77.

The decision reached by the United States District Court for the District of Kansas in *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 (D. Kan. Mar. 16, 2007), is instructive. In *Heartland*, the court refused to enforce a subpoena for a trade association’s internal documents because the advocacy of particular policy or legislative ends “is precisely the type of internal associational activity and past political activity that the First Amendment is designed to protect.” *Id.* at *20. In short, the exact type of document request propounded by the Committee here has been rejected by courts as improper under the First Amendment.

Third, the compelling interests of the Fund outweigh any interest that the Committee may have in obtaining these internal documents. The Committee may act only based on a valid legislative purpose. *See Watkins v. United States*, 354 U.S. 178, 197 (1957) (“[C]ompulsory process is used only in furtherance of a legislative purpose”); *see also Russell v. United States*, 369 U.S. 749 (1962) (“The power to investigate is limited to a valid legislative function.”) (Douglas, J., concurring). “We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected.” *See Watkins*, 354 U.S. at 197.

We believe the Committee’s interests in the Fund’s internal documents are uncertain at best. Rule X, cited in the Letter, does not justify this document request. The language quoted by the Committee—that the Committee “shall review and study on a continuing basis laws, programs and Government activities relating to nonmilitary research and development”—has no obvious connection to the documents requested in the Letter. It is not clear to us what valid legislative purpose lies behind the request for documents to the extent that the Committee seeks to regulate the conduct of State attorneys general. For the reasons discussed in the letter submitted on May 26, 2016 by the New York State Attorney General, the Committee does not have the authority to oversee or legislate the work done by State prosecutors or regulators. *See New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

The Letter also speaks of a concern that these State attorneys general may be somehow impacting the free speech rights of certain corporations or individuals. These concerns

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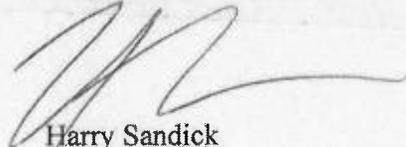
are also outside of the scope of Rule X, as they do not pertain to “laws, programs and Government activities.” But even if Rule X did somehow reach this subject, the response to a threat to free speech cannot itself be an infringement on First Amendment rights. As Justice Brandeis wrote many years ago, “[i]f there be time to expose through discussion the falsehood and fallacies, ... the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (“[I]t is our tradition that more speech, not less, is the governing rule.”). The Committee should not burden the free expression rights of the Fund in order to vindicate the free expression rights belonging to others.

Fourth, the Letter is not narrowly tailored to achieve a compelling governmental purpose, which is required when strict scrutiny is employed. The Letter seeks “[a]ll documents and communications” of all Fund personnel over a four-and-one-half year time period, with scores of other individuals and institutions, about a subject—climate change—which is a program area for the Fund. Due to its breadth, compliance with the Letter, even if a compelling government purpose had been articulated, would itself burden the First Amendment rights of the Fund.

* * *

We are available to discuss the Letter and the serious concerns expressed in this response. We also direct the Committee to the Fund’s website, which contains detailed information about the Fund’s grant-making and other program activities. These public materials will permit the Committee to learn about many of the issues that relate to the Letter in a manner that does not impose a burden on First Amendment rights. The Fund otherwise respectfully declines to comply with the Letter’s request for documents and information.

Respectfully submitted,



Harry Sandick